

Collection Manual

Examinership Caseworking Guidelines

This is a new Manual created in September 2020

A more recent version of this manual is available

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1 Background/legislation

Examinership is the process whereby an insolvent company petitions the Court for protection from its creditors and seeks the appointment of an Examiner in an attempt to restructure the company and secure an investment. It is an option available to insolvent companies as an alternative to liquidation or receivership, where certain criteria are met. The period of protection of the company will usually last 70 days from the date of issuing the Court papers but can be extended to 100 days if the Examiner is unable to formulate a scheme of arrangement, which will allow the company to survive after Examinership, within the initial 70-day period. Once the Court makes an order appointing an Examiner, no legal proceedings may be initiated against the company and creditors cannot collect any debt incurred by the company up to the date the petition papers are filed with the Court.

1.1 Which Court deals with the Examinership

The size of the company will determine which Court deals with the company. The High Court will deal with Examinership applications except for a company that, in respect of the latest financial year ended prior to the date of presentation of the petition, fell to be treated as a small company, by virtue of Section 350 Companies Act 2014. In this case, the Examinership application will be dealt with in the Circuit Court.

1.2 Conditions to place a Company into Examinership

Section 508-558 Companies Act 2014 deal with Examinership. The main conditions that must be met when petitioning to place a company into Examinership include:

- The company must be insolvent and unable to pay their debts as they fall due;
- There is no resolution for the winding up of the company and no order has been made for the winding up of the company;
- No receiver has been appointed within the previous 3 days to the company petitioning for the appointment of an Examiner;
- The company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency (NAMA), or if the company has such an obligation – (i) a copy of the petition has been served on that agency and (ii) the Court has heard that Agency in relation to making of the order;
- There must be a reasonable prospect of survival of the company as a going concern.

1.3 Application Process

Examinership is initiated by a petitioner making an ex-parte application to either the High Court or Circuit Court. The majority of applications are made by the company, however, an application can be brought by the company, the directors, the shareholders or a creditor of the company. An ex-parte application is one where the

petitioning party is present in Court seeking various directions or emergency orders pending a full hearing at a later date. These include service of papers on the Notice parties and advertising of the hearing.

Once the applicant issues papers to the Court, the company will come under the protection of the Court. The applicant may seek the appointment of an interim Examiner pending a full hearing, if this is deemed appropriate. The applicant must convince the Court that the appointment of an interim Examiner is appropriate. Once Court protection is granted to a company, a date is given by the Judge for a full hearing to appoint an Examiner or, where an interim Examiner has been appointed, confirm the appointment of the interim Examiner over the company. The hearing normally takes place 1-2 weeks after Court protection is first granted.

A legal notice is placed in two national newspapers and *Iris Oifigiúil*, advertising that a petition for Examinership was presented in respect of the company/companies. The legal notice gives details of the date the petition was presented to the Court, whether an interim Examiner has been appointed and the date the petition will be heard in Court. The legal notice gives creditors and other interested parties notice of the Examinership and the hearing and allows them the opportunity to support or oppose the Examinership. If a creditor wishes to object to the Examinership, an objection must be raised on affidavit. This affidavit must be filed with the Court and on the petitioner's solicitor in advance of the full hearing.

1.4 Papers Presented to the Court

The petition papers grounding the application for Examinership are filed with the Court by solicitors acting on behalf of the petitioner. Once the ex-parte application is granted, copies of these papers should be served on the notice parties as directed by the Court. The petition papers include:

- (i) Petition seeking the appointment of an Examiner;
- (ii) Grounding Affidavit sworn by the petitioner (usually, but not always, a director of the company)
- (iii) The Independent Expert Report (IER)

The IER and grounding affidavit normally contain certain information including background information on the company, the company's trading history, an outline of the circumstances which led to the petition being presented, a summary of the factors that indicates that the company has a 'reasonable prospect of survival' as a going concern, and that creditors are likely to receive a higher dividend in an Examinership than in a liquidation or receivership.

It is a statutory prerequisite that every petition for Examinership must include an IER, except in very limited circumstances, i.e. when the petition has been prepared in a very short timeframe. In the IER, the Independent Expert must give an opinion as to the company's prospects of survival and must exhibit projections to support his/her opinion. The IER should set out projected trading results:

- (i) for the period of Examinership which should show the company can trade and pay its debts as they fall due, and;
- (ii) 12-month post Examinership projections which should demonstrate that the company will be able to trade profitably once it successfully exits Examinership.

All applicants have a duty to act in upmost good faith. The Court, pursuant to Section 518 of the Companies Act 2014, may decline to hear a Petition if there is a breach in this regard.

1.5 Notice Parties

The papers outlined above are served on a number of notice parties and Revenue is almost always a notice party. Counsel for the petitioner will open the papers to the Court. The Court will hear from all creditors and interested parties who appear in Court before making a decision whether to grant an order appointing an Examiner.

1.6 Role of the Examiner

While the Examiner is nominated by the petitioner, he or she is also an officer of the Court and must act independently. The role of the Examiner is to ensure the company continues to trade during the protection period while he or she attempts to secure investment and formulate proposals for restructuring the company to allow it to survive after the Examinership concludes. The outcome for creditors must be better than in a liquidation or receivership.

The investment will provide a dividend to creditors and working capital into the company, if required. A successful Examinership ensures the liabilities of the company will be reduced to a sustainable level to enable it to survive as a going concern.

2 Role of the Insolvency Section before the appointment of an Examiner

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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3 Role of the Insolvency Section during the Examinership

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

4 Role of DMS during Examinership

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5 Duties of the Examiner during Examinership

The period of an Examinership usually lasts 70 days, which can be extended by application to the Court to 100 days if the Examiner is unable to formulate proposals for a scheme of arrangement within the initial 70-day period. During this time the Examiner must carry out statutory duties set out in the Companies Acts. This includes conducting an examination of the company's affairs with a view to formulating proposals for a scheme of arrangement, laying the proposals for a scheme of arrangement before the creditors for approval and, finally, presenting the scheme to the Court for its ultimate approval. The Examiner is also required to report periodically to the Court during the Examinership on the affairs of the company and the progress he or she has made in respect of formulating proposals during the protection period.

While the Examiner is an independent person appointed by the Court, a significant amount of the Examiner's time involves working with the directors, employees and suppliers of the company to ensure its ability to continue trading successfully. The Examiner must monitor the cash flow of the company throughout the protection period to ensure the company trades in accordance with the projections furnished to the Court at the petition stage. The Examiner must be able to show the Court that, based on the trade of the company during the protection period, the company has a reasonable prospect of survival as a going concern.

5.1 Day to Day responsibility for running the Company

During the protection period, the day to day responsibility for running the company lies with the directors. The Examiner will only take on those responsibilities where he or she is directed to do so following a Court Order.

5.2 Initial Protection of the Court is 35 days

The protection of the Court is initially for 35 days following the presentation of the petition. At day 35 (or such other date as the Court may order), the Examiner is required to prepare a report to the Court, outlining details of the work carried out

during the Examinership, along with details of the trading of the company. This report must be made available to any notice party listed at the start of the Examinership. Revenue is almost always a notice party in every Examinership and will receive a copy of the report. It is highly unlikely an Examiner will have the scheme of arrangement formulated by day 35 and will usually return to Court and seek an extension to day 70 of the protection period. The Court will only grant an application to extend the protection period if the Examiner can show that the company is trading in line with the projections prepared by the Independent Expert and the company and, therefore, continues to have a reasonable prospect of survival.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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5.3 Extended Protection of Court for 70 Days

At day 70 of the Examinership, the Examiner must return to Court to present his or her scheme of arrangement or to seek an extension of time up to day 100. This stage of the Examinership is similar to what happens at day 35. A report must be presented to the Court and sent to all notice parties. At this stage, the Examiner should have an investor secured or an interested party willing to invest.

5.4 Extended Protection 100 days

Once the extension of time to day 100 has been granted, the Examiner must formulate the scheme of arrangement and hold the creditors meetings. The Examiner must present his or her final report containing the proposals for a scheme of arrangement, which the creditors have voted upon, to the Court no later than 100 days after the presentation of the petition. The hearing to confirm the scheme of arrangement may, however, take place after that 100-day period has elapsed.

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6 Scheme of Arrangement

A scheme of arrangement is a statutory compromise or arrangement, under S.534 to S.541 of Companies Act 2014, between a company and its creditors or members for a payment of a dividend in an Examinership.

The scheme of arrangement is formulated by the Examiner once he or she has secured investment which is a requirement of the Examinership. The investment is used by the Examiner to pay their fees, pay some form of dividend to the different classes of creditors and as working capital in the company if required.

6.1 Securing Investment

To secure investment, the Examiner will normally place an advertisement in a national newspaper. Interested parties will have to sign a **Non-Disclosure Agreement (NDA)** before any details of the company are provided. Once the NDA is signed, the potential investor will receive an Information Memorandum from the Examiner giving high level information relating to the company. Each interested investor is given the opportunity to submit an investment proposal. The Examiner is required to review each proposal and, if a decision hasn't been reached, the Examiner may invite more than one interested party to carry out due diligence. Once completed, the Examiner will choose the investor who offers the best result for the creditors of the company.

Once the preferred investor is chosen, the Examiner will formulate a scheme of arrangement. Formulating the scheme of arrangement will involve the Examiner determining how the investment will be utilised. The Examiner must determine what level of dividend can be paid to each class of creditor and whether any of the investment will be required for working capital for the company once they successfully exit Examinership.

6.2 Class of Creditor

There is a number of different classes of creditors in every Examinership, for example secured creditor, retention of title creditor, unsecured creditor etc. Revenue usually has a liability in up to four classes – Super-preferential, Preferential, Contingent Preferential and Unsecured.

- **Super-preferential** is the employee's portion of all unpaid PRSI.
- **Preferential** is PAYE/employer PRSI/USC for the previous 12 months from the date of the Examinership, highest CT liability where there is a liability owing for more than 1 year, RCT for the previous 12 months from the date of the Examinership and VAT for the previous 6 months ending in the period prior to the date of Examinership.
- **Contingent Preferential** is any VAT due under Section 62A VATCA 2010.
- **Unsecured** is PAYE/Employer PRSI/USC owing for more than 12 months prior to the date of Examinership, CT not included in Preferential class, RCT owing for more than 12 months prior to the date of Examinership and VAT owing for the VAT period in which the Examinership falls in (up to the date of Examinership) and any owing for more than 12 months prior to the date of Examinership.

6.3 Dividends

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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6.4 Conditions for a Successful Scheme

For the scheme of arrangement to be successful, at least one class of creditor who is impaired by the scheme must vote to accept the scheme before it can be laid before the Court for approval. A creditor is impaired if the debt due to them is reduced by the scheme, or if that debt is repayable on terms which are less favourable to the creditor.

The proposals must not unfairly prejudice the creditors of the company. This means that the Examiner must ensure each class of creditor will fare better under the proposals he/she has formulated than they would in a liquidation or receivership scenario.

6.5 Meeting of Creditors

Following the formulation of the scheme of arrangement, the Examiner will convene meetings for all classes of creditors. A notice of the meeting is issued to each creditor, together with a copy of the scheme of arrangement. A separate meeting is convened for each class of creditor. The meetings give every creditor who wishes to attend (either in person or by proxy) the opportunity to ask any questions of the Examiner relating to the scheme of arrangement prior to voting on the scheme of arrangement.

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6.6 Reviewing the Scheme of Arrangement

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6.7 Contingent Creditor

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[...]

6.8 Voting in favour of a Scheme

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[...]

6.9 Opposing a Scheme

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[...]

6.10 Report to the Court of the Creditors' Meeting

Once all attendees at the various creditors' meetings have considered and voted on the scheme, the Examiner must present a report to the Court on the outcome of the meetings and setting out any modifications of the proposals adopted at the meetings. This report is designed to indicate to the Court the views of the various classes of the company's creditors. It will be up to the Court to approve the scheme of arrangement. Where there is no objection to the scheme of arrangement by creditors, the Court will usually approve the scheme of arrangement.

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7 Conclusion of Examinership

When the scheme of arrangement has been approved by the Court, the Court will order the date on which the scheme will become effective ("the effective date"). The effective date is the time at which the scheme of arrangement becomes binding on all parties affected by the scheme. This is usually the same day on which the scheme is approved by the Court. At the effective date, Court protection is removed, and the Examiner's role will cease. Payment to all creditors must be made within the timeframe outlined in the scheme of arrangement. This is normally within 30 days of the effective date.

7.1 Dividend Payments Received

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

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7.2 Write-Outs

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

7.3 Debt Management post Examinership

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

7.4 Removal of Protection

If, at any time during the 100 days, the Examiner believes the company no longer has a reasonable prospect of survival as a going concern or the Examiner is unable to secure investment, he or she must return to Court immediately to have protection removed. If this happens, the company will be placed into liquidation or (in circumstances where the petition was presented in response to a receiver being appointed) be placed in receivership.

7.5 Liquidation

Where Court protection is lifted, a liquidator must be appointed. If the Examinership is dealt with in the High Court, a liquidator can be appointed at the time the Court protection is withdrawn. On occasion, the liquidator appointed will be the Court appointed Examiner.

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Where the Examinership is dealt with in the Circuit Court, a liquidator cannot be appointed straightaway as the Circuit Court does not have jurisdiction to appoint liquidators. An application must, therefore, be made to the High Court to have a liquidator appointed or, alternatively, the company may elect to hold a creditors' meeting to appoint a voluntary liquidator. The onus is on the company to have a liquidator appointed.

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8 Causes of Examinership Failing

There are a number of reasons why an Examinership might fail:

- That it has become apparent to the Examiner that the company no longer has a prospect of survival on a going concern basis;
- The projections outlined in the IER have not been met and the company is unable to pay their debts as they fall due;
- The Examiner is unable to secure investment to formulate a scheme of arrangement;
- A creditor has concerns during the Examinership and successfully objects to an extension of time being granted by the Court;
- The Judge refuses to grant the application to appoint an Examiner.

As outlined above, where it becomes apparent there is no prospect of survival or the Examiner fails to secure investment or formulate a scheme of arrangement, the Examiner must return to Court at the earliest opportunity and apply to have the protection removed. This will result in the company being liquidated or (in circumstances where the petition was presented in response to a receiver being appointed) being placed in receivership.